FILE COPY

Office - Supreme Court, U. S.
FILED
OCT 7 1942
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1942

No. 13 40

MID-STATE HORTICULTURAL CO., INC.,
Petitioner,

vs.

THE PENNSYLVANIA RAILROAD COMPANY,
Respondent.

SUPPLEMENTAL BRIEF ON BEHALF OF PETITIONER.

HIRAM W. JOHNSON,
THEODORE H. ROCHE,
JAMES FARRAHER,
Mills Tower, San Francisco, California,
Attorneys for Petitioner.

THEO. J. ROCHE,
GEORGE A. STOCKFLETH,
Mills Tower, San Francisco, California,
Of Counsel.

Subject Index

	Page
Reference to Report of Opinion of the Lower Court	1
Jurisdictional Statement	2
Statement of the Case	2
Specification of Error	7
Argument	8
I. Interstate Commerce Act to be construed in accord with purpose sought to be accomplished by its enactment which is to prohibit preferences and discriminations	8
II. Upon the expiration of three years from the delivery of the shipments involved, the right to collect charges thereon was utterly destroyed by the operation of Section 16 (3) (a) of the Act, and thereafter the Court lacked jurisdiction to enforce the payment of such charges	11
Lapse of the three year period laid down by Section 16 (3) (a), not merely bars the remedy but destroys the right itself	12
The passage of the three year period of limitation fixed by Section 16 (3) (a), deprived the Court of jurisdiction to entertain the action	15
Section 16 (3) (a) effective even though not pleaded	18
III. The limitation provision of Section 16 (3) (a), cannot be waived, nor can a party be estopped to assert it	19
IV. Section 16 of the Commerce Act is all embracing and applies to all actions at law, including those having a common law origin	25
V. Assuming that the bill of lading, the form of which is provided by law and the Interstate Commerce Commission, establishes a contract between the parties,	

Page

any special agreement between the carrier and the shipper to prolong the limitation period prescribed by Section 16 (3) (a) of the Act constitutes a modification of the bill of lading in violation of law and is therefore utterly void 29

VI. Interstate Commerce Act for first time created a right which theretofore was non-existent in federal jurisdiction 36

VII. An action by a carrier to enforce payment of transportation charges is based upon the Interstate Commerce Act and not upon contract as contended by respondent and as held by the lower Court 40

VIII. The dissenting opinion in the case before the District Court of Appeal is consistent with the law as laid down by the decisions of this Court 47

Discussion of Respondent's Citations 48

Pennsylvania R. Co. v. Susquehanna decision 50

Legal principles enunciated in Susquehanna case decision are antagonistic to declarations of Appellate and other Courts 52

Cases relied upon by respondent in its answer to brief of petitioner accompanying the petition are neither controlling nor applicable 57

Alleged waiver of limitation statute void because prohibited by Interstate Commerce Act as a discrimination 60

Conclusion 63

Table of Authorities Cited

	Pages
Allen v. New York Ry. Co., 15 F. (2d) 532	47
American Ry. Express v. American Trust Co., 47 F. (2d) 16	36, 47
American Ry. Express Co. v. Shideler, 88 Ind. App. 645, 165 N. E. 336	22
Arkansas Fertilizer Co. v. United States, 193 Fed. 667	16, 18, 21, 38, 44, 52, 54
Atchison, T. & S. F. R. Co. v. Hunt Bros. Packing Co., 34 F. (2d) 582	60
Atchison T. & S. F. R. Co. v. Robinson, 233 U. S. 173	34
W. H. Blodgett Co. v. New York C. R. Co., 261 Mass. 365, 159 N. E. 45	35, 53
Button v. A. T. & S. F. Ry. Co., 1 F. (2d) 709 (C.C.A. 8)	14, 28, 39, 45, 52
Central R. Co. v. Mauser, 88 Atl. 791	41
Chesapeake and Ohio R. Co. v. Martin, 283 U. S. 209	32
Chicago & Alton R. v. Kirby, 225 U. S. 155	36
Chicago I. & L. Ry. v. Peterson, 168 Wis. 267, 169 N. W. 558	36, 46, 53
Chicago N. W. R. Co. v. J. I. Case etc. Wks., 173 Wis. 237, 180 N. W. 846	36, 46, 47, 53
Cohen v. Texas N. O. R. Co., 303 Ill. App. 606, 25 N. E. (2d) 562	33
Danzer v. Gulf Co., 268 U. S. 633	10, 14
Galveston etc. Co. v. Webster, 27 F. (2d) 765 (D. C. Tex.)	14, 25, 27, 38, 44, 52, 54
Georgia F. & A. R. Co. v. Blish Milling Co., 241 U. S. 190	24
Hagger v. Helvering, Conn., 308 U. S. 389	8
Helvering v. New York Trust Co., 292 U. S. 455	9
Kansas City etc. Co. v. Wolf et al., 261 U. S. 133	10, 13, 27, 53
L. M. Kirkpatrick Co. v. I. C. R. Co., 195 So. 692	10, 31

Pages

Louisville & N. R. Co. v. Central Iron & Coal Co., 265 U. S. 59 57
Louisville & N. R. Co. v. Cory, 54 F. (2d) 8 (C.C.A. 6) 14, 18, 39
Louisville & N. R. Co. v. U. S., 282 U. S. 740 9

Morgan's L. & T. R. v. Cocke, 4 F. (2d) 961, 273 U. S. 655 14
Moser Co. v. Payne, Dir. Gen., 92 W. Va. 41, 114 S. E. 365 33

Nashville, Chattanooga & St. Louis R. Co. v. Tennessee, 262 U. S. 318 9
New York C. R. Co. v. Mutual Orange Distributors, 265 U. S. 59 59
New York, N. H. & H. R. Co. v. California Fruit Growers Exchange, 125 Conn. 241, 5 Atl. (2d) 353 33
Northern Wisconsin Co. v. Chicago & N. W. R. Co., 234 N. W. 726 36

Peninsula Pro. Exchange v. New York Co., 137 Atl. 350. 276 U. S. 599 ..... 14, 46, 53
Penn. P. Co. v. Carolina P. Cement Co., 16 F. (2d) 760 ..... 14, 39, 43, 49, 52
Penn RR. Co. v. Hamilton Coal Co., 125 Atl. 405 35
Penn RR. Co. v. Internat. Coal Mg. Co., 230 U. S. 184 35
Penn. R. Co. v. Midstate Horticultural Co., 124 P. (2d) 902 ..... 1, 61
Penn. R. Co. v. Midstate Horticultural Co., 21 Cal. (2d) 243 1
Penn. R. Co. v. Susquehanna C. Co., 23 F. (2d) 499 48
Phillips v. Grand Trunk R. Co., 236 U. S. 662 ..... 10, 13, 18, 19, 27, 53
A. J. Poor Grain Co. v. Chicago etc. Co., 12 Inter. Commerce Rep. 418 43

Rogers v. East Carolina Ry., 186 N. C. 86, 118 S. E. 885 24

Shroyer v. Chicago etc. Co., 222 S. W. 1095 33
Spartan Mills v. Davis, 126 S. C. 312, 119 S. E. 905 ..... 23, 30

Texas etc. R. Co. v. Leatherwood, 250 U. S. 478 31
Texas & P. R. Co. v. Interstate C. C., 162 U. S. 197 10

United States v. Koenig Coal Co., 270 U. S. 512 9
U. S. ex rel. Louisville Cement Co. v. I. C. C., 246 U. S. 638 ..... 15, 28

Pages

Vicksburg etc. R. Co. v. Paup, 47 F. (2d) 1069 ..... 46, 52

Western Union v. Esteve Bros., 256 U. S. 566 35
Wisconsin Bridge & Iron Co. v. Illinois Terminal Co., 88 F. (2d) 459 (C.C.A. 7) 14, 17, 20, 55

Zang v. Railway Express Co., 196 N. E. 901, 130 Ohio State 17 ..... 14, 47

Statutes

Interstate Commerce Act, Sec. 16 (3), (a), Title 49 U. S. C. A. Sec. 16 (3) (a) 2, 12, 18, 58
Interstate Commerce Act, Sec. 20, Title 49 U. S. C. A. Sec. 20, par. 11 ..... 22, 30

Title 28 U. S. C. A. Sec. 344 (a), (b) 2

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1942

No. 913

MID-STATE HORTICULTURAL CO., INC.,
Petitioner,

vs.

THE PENNSYLVANIA RAILROAD COMPANY,
Respondent.

SUPPLEMENTAL BRIEF ON BEHALF OF PETITIONER.

REFERENCE TO REPORT OF THE OPINION OF THE LOWER COURT.

The official report of the opinion of the Supreme Court of the State of California, the lower court to which the writ of certiorari is directed, is found in 21 Cal. (2d) 243, 131 Pac. (2d) 544.

The majority and dissenting opinion of the District Court of Appeal of the State of California, have not been officially reported, but will be found in 124 Pac. (2d) 902.

JURISDICTIONAL STATEMENT.

This action concerns the collection of freight charges arising out of the transportation of commodities in interstate commerce.

Involved herein is the construction of Section 16 (3) (a) of the Interstate Commerce Act. The petitioner is concerned with the construction placed upon said section of the Interstate Commerce Act by the Supreme Court of the State of California, which petitioner contends is in direct contradiction of the interpretation placed upon that section by this court and by every federal appellate court which has been called upon to consider such section.

Section 16 (3) (a) of the Act reads:

> "All actions at law by carriers subject to this chapter for recovery of their charges, or any part thereof, shall be begun within three years from the time the cause of action accrues, and not after." (49 U.S.C.A., Sec. 16 (3) (a).)

The court has jurisdiction of this proceeding under 28 U. S. C. A., Section 344 (a) (b).

STATEMENT OF THE CASE.

The action was instituted to recover from petitioner, consignor, certain transportation charges arising out of shipments in interstate commerce.

In October and November, 1932, respondent carrier transported on petitioner's order 21 carloads of grapes from California, each of which was originally con-

signed to, or, while in transit, diverted to the Jerome Distributing Company at a stated destination located in either New York or New Jersey.

It is admitted that none of the transportation charges for such grapes was prepaid by petitioner. Although respondent carrier was legally obligated to collect such transportation charges from Jerome Distributing Company upon delivery to it of the shipments, instead of so doing, in purported payment of such and other charges (R. 104, f. 160) it accepted from Jerome Distributing Company three (3) checks, viz.: one dated November 21, 1932 for $10,433.46 (R. 100-1, fols. 153-155), another dated November 22, 1932 for $7035.19 (R. 101-102, fols. 155-157), and another dated November 19, 1932 for $9237.11 (R. 103-104, fols. 158-159). Photolithographs of these checks will be found on pages 159 and 164 of the record.

At or about the time these checks were accepted, *respondent receipted in full the freight bills covering the shipments above mentioned* and delivered them to the consignee, Jerome Distributing Company (R. 111-114, fols. 170-174), which in turn sent them to the consignor, petitioner herein, obviously for the purpose of convincing petitioner that the transportation charges had been paid. (R. 153-155, fols. 231-235.)

The bank upon which the Jerome Distributing Company's checks were drawn refused payment on the ground of insufficiency of funds on deposit to cover them. (R. 100, fol. 154; R. 102, fol. 156; R. 104, fol. 159.)

Subsequently respondent carrier instituted an action in the New York Courts against the Jerome Distributing Company to enforce payment of the three checks above mentioned, and on July 9, 1936, secured judgment against that company in the sum of $21,294.00. (R. 121, fols. 184-185.)

All attempts by respondent to enforce payment of the judgment were without avail, because of the insolvency of the Jerome Distributing Company. This is clearly made manifest by the non-payment of the checks above mentioned (R. 125-129, fols. 191-196); respondent's unsuccessful efforts to collect the checks (R. 121, fol. 184); the default judgment entered against the Jerome Company in favor of respondent for the amount of the unpaid checks, which judgment could not be enforced (R. 121, fol. 185); and the further fact that respondent never received any moneys from the Jerome Company (R. 122, fol. 185).

No notice was given petitioner that the freight charges had not been paid, that respondent had taken checks in payment or purported payment thereof, or that the checks had been refused payment, until June 23, 1933. (R. 143-145, fols. 217-220.)

Long before such information was given to petitioner the Jerome Company had become insolvent and it was no longer possible for petitioner to enforce against it the collection of these transportation charges which, because of the freight bills receipted by respondent, it believed (as it had the right so to do) had been paid in full. It is because of this situa-

tion that if the judgment of the lower court is affirmed petitioner will be subjected to double liability.

Within a few days before the expiration of the three-year period within which an action could be brought to recover such transportation charges, respondent for the first time demanded payment thereof from petitioner. (R. 122, fol. 187.) In fact, during the interim, damage claims were paid by respondent to petitioner without any attempt on the part of respondent to offset them because of the unpaid transportation charges here involved. (R. 147-148, fols. 223, 224.)

To permit it to investigate the basis of said demand, petitioner, on October 25, 1935, signed a stipulation not to plead the statute of limitations, in consideration of which respondent agreed to defer its threatened action until January 1, 1936.

As a result of its investigation, petitioner concluded that it was not responsible for the claimed transportation charges and so advised respondent, whereupon the action herein involved was instituted.

In its defense petitioner contended that the waiver of the statute of limitations signed by it, and the coincident agreement by respondent to defer its contemplated action until January 1, 1936, violated the purposes intended to be accomplished by Congress in enacting the Interstate Commerce Act, as such purposes had been repeatedly declared by this and other federal courts, and that they were therefore void. As a special defense, petitioner pleaded that because of

respondent's conduct and silence, of which comment is made above, respondent was *estopped* from enforcing payment of such transportation charges against petitioner; it being asserted by petitioner that if it had been advised by respondent that its transportation charges had not been paid, or if respondent had not receipted the freight bills covering said charges, in settling its accounts with Jerome Distributing Company no credit would have been given to it by petitioner for such transportation charges, and petitioner would not now be confronted with the double payment of these charges in the event the judgment of the Court below is enforced.

The final pleadings in this case were: respondent's first amended complaint (R. 1-41) and petitioner's demurrer thereto (R. 41-49, fols. 54-65); petitioner's amended answer (R. 51-77, fols. 72-110) and respondent's demurrer to petitioner's amended answer. (R. 77-81, fols. 112-117.)

The first amended complaint was divided into twenty-one causes of action (one for each carload of grapes). Petitioner, by demurrer to its amended answer, raised the point as to each count of plaintiff's amended complaint that it did not

> "state facts sufficient to constitute a cause of action, in that it appears on the face thereof that the same is barred by the provisions of par. 3, sec. 16, of the Interstate Commerce Act." (R. 41-42, fol. 55; R. 42, fols. 55-56, etc.)

The trial Court struck from petitioner's pleading, and from the case, the special defense that respond-

ent was estopped from looking to petitioner for payment of the freight charges because:

(1) It accepted the checks of Jerome Distributing Company in payment of the charges, indorsed "paid" on the freight bills, and delivered such bills so receipted to such company.

(2) Jerome Distributing Company delivered its "receipted" bills to petitioner and thus secured a credit by offset against moneys owing to petitioner from that company, save and except the nominal sum of $790.00, and then became insolvent.

(3) By prosecuting its claim against Jerome Distributing Company to judgment it had signified its election to look to that company for the debt. (R. 74, fol. 106; R. 75, fol. 108; R. 78-79, fol. 114; R. 82, fol. 120.)

And following the trial, in reliance upon the purported "waiver" the Court found that the action was not barred by the provisions of Section 16 (3)(a), of the Act, despite the running of the three-year period, and gave judgment against petitioner for $21,822.86 and costs. It is the affirmance of this judgment by California's Supreme Court, of which we here complain.

SPECIFICATION OF ERROR

The Supreme Court of California erred in holding that the three year time limit prescribed by Section

16 (3)(a) of the Interstate Commerce Act for the filing of action by the carrier to collect its charges, can be waived, and upon that ground affirming the trial Court's judgment against petitioner herein in an action filed more than three years after the accrual of the carrier's cause of action. (See opinion, R. 197-204.)

ARGUMENT.

I.

INTERSTATE COMMERCE ACT TO BE CONSTRUED IN ACCORD WITH PURPOSE SOUGHT TO BE ACCOMPLISHED BY ITS ENACTMENT WHICH IS TO PROHIBIT PREFERENCES AND DISCRIMINATIONS.

It is a cardinal rule of construction, universally recognized, that in construing and interpreting a statute the purpose sought to be accomplished by its enactment is the star by which the Court should be guided. As was said by this Court in the late case of

Hagger v. Helvering, Comm'r., 308 U. S. 389, 84 L. Ed. 340:

> "All statutes must be construed in the light of their purpose. A literal reading of them which would lead to an absurd result is to be avoided when they can be given a reasonable application consistent with their words and the legislative purpose." (Citing many United States Supreme Court decisions.)

Moreover, each provision of the Act should be read in connection with its remaining provisions and con-

strued and interpreted with due regard to the manifest purpose of the whole Act.

Nashville, Chattanooga & St. Louis R. Co. v. Tennessee, 262 U. S. 318, 67 L. Ed. 999;

Helvering v. New York Trust Co., 292 U. S. 455, 78 L. Ed. 1361.

The purposes sought to be accomplished by Congress in its enactment of the Interstate Commerce Act are a part of the history of this nation and have been so comprehensively enunciated in numerous decisions construing various provisions of the Act that they need no reiteration here. This is pointed out in a long line of decisions, many rendered by this Court and other federal Courts, as well as the highest Courts of almost every state. It is impossible to misconceive these purposes because they are implicit in the Act. They are clearly set forth in

United States v. Koenig Coal Co., 270 U. S. 512 at 519, 70 L. Ed. 709,

where, in speaking of the purpose of the Act, this Court said:

> "We have often declared that the purpose of Congress in the Elkins Law was to cut up by the roots *every form of discrimination, favoritism and inequality.*"

In

Louisville & N. R. Co. v. U. S., 282 U. S. 740 at 749, 75 L. Ed. 672, 679,

it is stated:

> "The legislative history of the Interstate Commerce Act shows clearly that *the evil of discrimi-*

> *nation was the principal thing aimed at.* Senate Report No. 46, 49th Cong. 1st Sess. p. 215, See Kansas City S. R. Co. v. H. Albers Commission Co., 223 U. S. 573, 597, 56 L. Ed. 556. This court has said that the language of the Act is *'certainly sweeping enough to embrace all of the discriminations of the sort described which it was within the power of Congress to condemn'."*

which decision has been both amplified and reinforced by this Court's decisions in:

A. J. Phillips v. Grand Trunk R. Co., 236 U. S. 662, 59 L. Ed. 774;

Kansas City etc. Co. v. Wolf et al., 261 U. S. 133, 67 L. Ed. 571;

Danzer v. Gulf Co., 268 U. S. 633, 69 L. Ed. 1126,

and by many other cases to which reference is hereinafter made.

See, also,

L. M. Kirkpatrick Co. v. I. C. R. Co. (Miss.), 195 So. 692;

Texas & P. R. Co. v. Interstate Com. Com'n., 162 U. S. 197, 40 L. Ed. 940,

---

Unless otherwise noted any emphasis in quotations is ours.

II.

UPON THE EXPIRATION OF THREE YEARS FROM THE DELIVERY OF THE SHIPMENTS INVOLVED, THE RIGHT TO COLLECT CHARGES THEREON WAS UTTERLY DESTROYED BY THE OPERATION OF SECTION 16 3 (a), AND THEREAFTER THE COURT LACKED JURISDICTION TO ENFORCE THE PAYMENT OF SUCH CHARGES.

The shipments here involved were delivered to the consignee on various dates between October 28 and November 21, 1932, while the present action was not begun until December 31, 1935, some three years and forty days after the last delivery date. It is conceded that the causes of action for recovery of the charges upon each shipment accrued upon the date of delivery. It is petitioner's contention that upon the expiration of a period of three years subsequent to the delivery date respondent's claim for transportation charges was wiped out by operation of the provisions of Section 16 3 (a), of the Interstate Commerce Act (already quoted on p. 2 herein) and that such section had the effect of not merely barring the carrier's remedy for the collection of charges, but of uprooting and destroying the right itself, so as to forever discharge the shipper's liability therefor and even to deprive the courts of jurisdiction of an action seeking to recover such charges. These propositions, we maintain, are firmly established by a body of precedents by this Court as well as by other federal tribunals, and must compel a reversal of the judgment in this case.

Lapse of the Three-Year Period Laid Down by Section 16 3 (a) Not Merely Bars the Remedy, But Destroys the Right Itself.

While it is usual to refer to all statutes prescribing a definite period of time within which an action or proceeding may be instituted, as a statute of limitations, the statute here relied upon is not at all comparable to the usual one, which neither *destroys* nor *impairs the right of action itself,* but merely provides a pleadable defense of which advantage may be taken by defendant at his pleasure or discretion, and when not pleaded is unavailable as a defense. Inasmuch as such a statute confers upon a defendant a personal privilege which may or may not be exercised by him, and relates exclusively to the remedy and not to the right, it follows that its provisions may be waived either for a definite period or generally.

In the instant case, however, we are not dealing with such a statute of limitations. The statute here involved, by its very terms, upon the expiration of the time therein prescribed for the institution of an action, destroys the right of action itself.

Section 16, paragraph (3) (a), of the Interstate Commerce Act (49 U. S. C. A.) provides:

> "(a) All actions at law by carriers subject to this chapter for the recovery of their charges, or any part thereof, shall be begun within three years from the time the cause of action accrues, **and not after.**"

It is the phrase "*and not after*" as well as the purpose sought to be accomplished by the limitation

provision that differentiates this statute from the ordinary statute of limitations and which destroys the right of action itself instead of merely destroying the remedy.

The leading case upon this subject is

A. J. Phillips Co. v. Grand Trunk W. R. Co., 236 U. S. 662, 59 L. Ed. 774,

which was an action to recover overcharges, commenced more than four years after plaintiff's cause of action arose. It was claimed that the case was governed by the Michigan practice, which precludes defendant from taking advantage of the statute of limitations by a general demurrer to the declaration. In overruling that contention and construing the statute here involved, this Court at page 667, said:

> "But that rule does not apply to a cause of action arising under a statute which indicates its purpose to prevent suits on delayed claims, by the provisions that all complaints for damages should be filed within two years, **and not after.** Under such a statute the lapse of time not only bars the remedy, but destroys the liability (Finn v. United States, 123 U. S. 227, 232, 31 L. Ed. 128, 130, 8 Sup. Ct. Rep. 82), * * *" (Emphasis the Court's.)

The decision was approved in

Kansas City Southern Ry Co. v. Wolf, 261 U. S. 133, 67 L. Ed. 571,

where, after quoting extensively from the earlier case, this Court at pages 139-140 went on to say:

> "True it is that the claim of Phillips Company was based upon schedule tariff charges thereto-

fore declared to be unreasonable by the Interstate Commerce Commission, while here the payments demanded are said to exceed the published rates when properly applied. But the doctrine of the Phillips case and the reasoning advanced to support it we think are applicable to the circumstances of the instant case. *The lapse of time had destroyed any liability by the carrier to the shipper or his assignee* for the *alleged overcharges,* and the demurrer should have been sustained."

The following decisions approve the *Phillips* case (above quoted), either quoting it or using almost identical language:

Wisconsin Bridge & Iron Co. v. Illinois Terminal Co., 88 Fed. (2d) 459 (Seventh C. C. A.);

Danzer v. Gulf etc. Co., 268 U. S. 633, 69 L. Ed. 1126;

Galveston etc. Co. v. Webster, 27 F. (2d) 765;

Morgan's L. & T. R. v. Cocke, 4 Fed. (2d) 961, 273 U. S. 655, 71 L. Ed. 825;

Peninsula Prod. Exch. v. New York etc. Co., 137 Atl. 350 (aff. by this court in memorandum opinion, 276 U. S. 599, 72 L. Ed. 724);

Button v. A. T. & S. F. Ry. Co., 1 F. (2d) 709;

Penn. R. Co. v. Carolina P. Cement Co., 16 F. (2d) 760;

Louisville & N. R. Co. v. Cory, 54 F. (2d) 8;

Zang v. Railway Express Co., 196 N. E. (Ohio) 901.

The Passage of the Three-Year Period of Limitation Fixed by Section 16(3)(a) Deprived the Court of Jurisdiction to Entertain the Action.

The vital and, for the purposes of this case, conclusive, difference between the effect of the limitation provision with which we are here concerned, and that of an ordinary statute of limitations which merely affords the defendant a personal privilege to set up lapse of time as a bar to the cause of action sought to be enforced against him, is brought out very clearly by the view, expressed in the majority of the decisions involving Section 16 (3) that the passage of the limitation period therein prescribed has the effect of depriving the Court or other tribunal of jurisdiction to entertain any proceeding for the enforcement of the claim or demand.

In the case of

U. S. ex rel. Louisville Cement Co. v. Interstate Commerce Comm., 246 U. S. 638, 62 L. Ed. 914,

the Commission had refused to entertain a claim for overcharges upon the ground that it had been filed too late to comply with the provisions of Section 16, which then read:

> "all complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after."

Thereupon the claimant sought a writ of mandamus to compel the Commission to consider its claim. The

writ was denied by the lower Court. In reversing the judgment of the lower Court, for the reason that two years had not in fact elapsed following the accrual of the cause of action, this Court gave consideration to the effect of the statute upon the power of the Commission, and had this to say:

> "It is thus made very clear that the holding of the Commission was not that, having jurisdiction over the claim, upon consideration thereof, it was found to be barred by a statute of limitation, but that the language of the two-year provision of the act was *jurisdictional* and placed it so beyond its power that it could not be considered at all, and that, for this reason, the petition, to the extent that it related to the overcharges paid on February 1, 1911, was dismissed.
>
> We agree with this conclusion of the Commission, that the two-year provision of the act is *not a mere statute of limitation, but is jurisdictional,*—is a limit set to the power of the Commission, as distinguished from a rule of law for the guidance of it in reaching its conclusion * * * That such was the opinion of this court was clearly intimated in *Phillips Co. v. Grand Trunk Western R. Co.*, 236 U. S. 662, 667, 59 L. Ed. 774, 776, 33 Sup. Ct. Rep. 444, and it conforms in principle to a similar limitation, but for six years, on the jurisdiction of the court of claims (citing cases)." (p. 642.)

The same result was reached upon a similar set of facts in

Arkansas Fertilizer Co. v. United States, 193 Fed. 667,

which was a petition in the commerce court to annul an order of the Commission refusing to entertain a claim for damages filed beyond the two-year limit of Section 16. The Court rejected the petition, and said in part:

> "The purposes of the act as a scheme of regulation and the language of the provision in question indicate clearly that this is a limitation which operates without the aid of pleading. So far from being a defense which the carrier may or may not interpose, it is in effect a restriction upon the authority of the Commission itself, since its plain intent is to deprive that body of jurisdiction after the lapse of two years." (p. 673.)

And in the recent case of

Wisconsin Bridge & Iron Co. v. Illinois Terminal Co., 88 F. (2d) 459 (Seventh C. C. A.),

where a carrier sought to recover freight charges, but delayed in commencing its action until more than three years after the cause of action had accrued, the Appellate Court, reversing a judgment for plaintiff, said of Section 16 (3) (a):

> "The Supreme Court has in numerous cases construed these limitations as *jurisdictional*, and held that the lapse of time not only bars the remedy but also destroys the liability * * *. This being true, we think that the defense of limitations was not subject to estoppel, and that it could properly be raised by demurrer or plea. *and even if appellant had failed to plead it, it would not thereby have conferred jurisdiction upon the court over the claim which had already been barred at the time the action was brought.*" (p. 461.)

Section 16(3)(a) Is Effective Even Though Not Pleaded.

Unlike the ordinary statute of limitations, which goes only to the remedy and not to the right, advantage of which is lost by failure to plead it, the three-year provision of Section 16(3)(a), like the other similar limitations contained in Section 16(3), is effective to bar an action commenced after that time even though it be not pleaded by the defendant. The extension agreement of October 25, 1935, upon which respondent relies to overcome the plea of limitations, provided that Midstate

> "will not *plead* in any such suit the defense of any general or special statute of limitations."

The ineffectiveness of such an agreement becomes apparent when it is realized that even had Midstate complied therewith by omitting to *plead* the provisions of Section 16(3)(a), the Court, in conformity with the decisions construing that section, should have applied it to the facts herein and held the action barred by lapse of time.

A. J. Phillips Co. v. Grand Trunk W. R. Co., 236 U. S. 662, 667, 59 L. Ed. 774;

Louisville & N. R. Co. v. Cory, 54 F. (2d) 8, 11;

Arkansas Fertilizer Co. v. United States, 193 Fed. 667, 673.

III.

THE LIMITATION PROVISION OF SECTION 16(3)(a) CANNOT BE WAIVED, NOR CAN A PARTY BE ESTOPPED TO ASSERT IT.

A statute such as the one under consideration, which provides that an action must be commenced within a specified period of time *"and not after,"* and which, as we have heretofore demonstrated, has the effect of destroying the cause of action and depriving the Court or other tribunal of jurisdiction after the lapse of the time prescribed for bringing suit, is in such respects strikingly different from the ordinary statute of limitations which goes merely to the remedy. We now direct our attention to another characteristic of Section 16 (3) which differentiates it from the usual statute of limitations, namely, that it is not susceptible of waiver by the party in whose favor it runs, nor can such party, by no matter what conduct, estop himself to rely upon its provisions in his defense.

This peculiarity, like those previously discussed, arises from the construction of the section as part of the Interstate Commerce Act, and in consonance with the purposes to be achieved by the scheme of that Act. This was pointed out in the leading case upon the subject,

A. J. Phillips Co. v. Grand Trunk Western R. Co., 236 U. S. 662, 59 L. Ed. 774,

heretofore cited where this Court, holding that the bar of the statute might be asserted by way of general demurrer despite the Michigan practice to the contrary, said:

"This will more distinctly appear by considering the requirements of uniformity which in this, as in so many other instances, must be borne in mind in construing the Commerce Act. The obligation of the carrier to adhere to the legal rate, to refund only what is permitted by law, and to treat all shippers alike, would have made it illegal for the carriers, *either by silence or by express waiver,* to preserve to the Phillips Company a right of action which the statute required should be asserted within a fixed period. To have one period of limitation where the complaint is filed before the Commission, and the varying periods of limitation of the different states, where a suit was brought in a court of competent jurisdiction; or to permit a railroad company to plead the statute of limitations as against some and to waive it as against others, would be to prefer some and discriminate against others, in violation of the terms of the Commerce Act which forbids all devices by which such results may be accomplished. The prohibitions of the statute against unjust discrimination relate not only to the inequality of charges and inequality of facilities, but also the giving of preferences by means of consent judgments or the waiver of defenses open to the carrier. The railroad company, therefore, was bound to claim the benefit of the statute here, and could do so here by general demurrer."

Wisconsin Bridge & Iron Co. v. Illinois Terminal Co., 88 F. (2d) 459 (Seventh C. C. A.) heretofore cited,

was an action by a carrier to collect a balance due on transportation charges on certain shipments of steel. The defendant shipper relied upon the provisions of

Section 16 (3) (a), the action having been commenced more than three years after it accrued. The trial Court held that defendant was estopped from setting up the defense of limitations because the delay had been caused by the submission of the controversy to the Commission at defendant's request. The Circuit Court of Appeals reversed the judgment, and after referring to the propositions that the limitations of Section 16 (3) are jurisdictional and not only bar the remedy but destroy the liability, said:

> "This being true, *we think that the defense of limitations was not subject to estoppel.*" (p. 461.)

The plaintiff also attempted to make out a case of *implied contract,* and in rejecting this contention the Court referred to the fact that the cause of action accrued upon delivery of the shipments, and stated that

> "* * * events occurring subsequent to the delivery may not be relied upon to extend the period within which the suit must be brought."

As was said in the case

Arkansas Fertilizer Co. v. United States, 193 Fed. 667 at p. 671, heretofore cited:

> "Any serious doubt in this case should disappear, as we think, when once it is clearly perceived that the relations between shipper and carrier are no longer contract relations, that the rights and obligations of both are fixed, not by mutual agreement but by the mandate of the statute; and the duty of a shipper to pay and of the carrier to collect the tariff rate in force when the transportation takes place, even though that rate be grossly excessive, is a duty imposed

by legislative enactment; and *that it is beyond the power of the parties to evade or modify this duty by any consent or understanding.* In other words, since the obligation to pay the tariff charge springs from a positive law, the extension of credit because such charge is claimed or admitted to be unreasonable cannot be granted by the carrier or accepted by the shipper."

Among other things, the Interstate Commerce Act provides that it shall be unlawful for any carrier to provide by rule, contract, regulation or otherwise, a period shorter than two years for the institution of suit against it to recover damages arising out of the shipment. (49 U. S. C. A. Sec. 20, par. 11.) In many instances carriers, acting under authority of this provision, have issued bills of lading providing the time within which an action for damages must be commenced after notice by the carrier of disallowance of the claim. In such cases the limitation of time, although authorized by statute, is necessarily based upon a contract entered into between the parties. *Nevertheless,* the Courts have had no difficulty in declaring void as against public policy any attempt on the part of the carrier or shipper to enlarge, vary or waive the limitation of time originally specified in the bill of lading.

In

American Railway Express Co. v. Shideler (Ind.), 88 Ind. A. 645, 165 N. E. 336,

where it was claimed that the limitation had been waived and that the action was therefore not barred, the Court said:

"Under the law this action was, at the time it was begun, barred by limitation made a part of the contract for transportation of the car of tomatoes involved in this action, upon which contract appellee sued herein.

"Under the law appellant and appellee were bound by the terms and provisions of the contract covering the transportation of this interstate shipment and appellant did not and legally could not waive the limitation of time within which this action must, by the terms of such contract, be begun." (Citing cases.)

One of the leading cases of this class is

Spartan Mills v. Davis, Director Gen. (S. C.), 126 S. C. 312, 119 S. E. 905 at 907.

There it was claimed that the limitation, as specified in the bill of lading, had been waived by the carrier. After holding that the alleged waiver was legally deficient, the Court said:

"Even if there had been a positive agreement on the part of the defendant to extend the time within which suit should be commenced, it would not avail the plaintiff. In the case of Allen v. Davis, 118 S. E. 614, this court declares: 'While we have been cited to no decision upon the precise point here involved, the Supreme Court of the United States would seem to be clearly committed to the doctrine that the prohibitions of the federal law "against unjust discrimination relate not only to inequality of charges and inequality of facilities, but also to the giving of preferences by means of consent judgments or the waiver of defenses open to the carrier" (citing cases) * * * If the carrier may by agreement or by conduct fix what

is "a reasonable time for delivery" in any case it would seem that it might or might not invoke the defense of this contractual limitation at its option and could in that particular practice at pleasure discrimination in the payment or contest of claims. (Citing cases.)' "

See, also,

Rogers v. East Carolina Ry. (N. C.), 186 N. C. 86, 118 S. E. 885.

In

Georgia F. & A. R. Co. v. Blish Milling Co., 241 U. S. 190, 60 L. Ed. 948,

there was involved, among others, the question whether a claim for damages had been properly made against the carrier as required and within the time prescribed by the bill of lading issued by the initial carrier. Mr. Justice Hughes, speaking for the Court, said:

"But the parties could not waive the terms of the contract under which the shipment was made pursuant to the federal act; nor could the carrier by its conduct give the shipper the right to ignore these terms, which were applicable to that conduct, and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariff and regulations. *A different view would antagonize the plain policy of the act and open the door to the very abuses at which the act was aimed* (citing cases). *We are not concerned in the present case with any question save as to the applicability of the provision and its validity, and, as we find it to be both applicable and valid, effect must be given to it.*"

IV.

SECTION 16 OF THE COMMERCE ACT IS ALL EMBRACING AND APPLIES TO ALL ACTIONS AT LAW, INCLUDING THOSE HAVING A COMMON LAW ORIGIN.

The proposition above entitled is given consideration in the brief filed by petitioner in support of its application for certiorari. (Brief, pp. 28-31.) We do not believe that any useful purpose will be subserved by a reproduction here of the argument there made and we are therefore limiting ourselves to the following supplement thereto.

With the exception of the character of the claim referred to, each subdivision of Section 16 is couched in comparable language. The statute (Sec. 16) is made specifically applicable to *all* actions at law by a carrier *which is subject to the Act*, and makes no distinction between an action brought to enforce a right given by the Act and an action based on a contract or otherwise founded—the *sole* qualifications being that the action shall be one *at law* and must be one instituted *by* or *against* a "*carrier* subject to this chapter." As was said in *Galveston etc. Co. v. Webster*, 27 Fed. (2d) 765,

> "The Congress has undertaken in this Transportation Act to definitely fix the time within which *carriers of interstate commerce* may bring suits for recovery of freight charges. * * *"

In all of the decisions in which Section 16 has been construed, with the exception of the *Penn. R. Co. v. Susquehanna Co.* case (supra), it has been consistently held that, *by virtue of the language of the section,*

at the expiration of the period therein prescribed the cause of action was utterly and completely destroyed, and the Court's jurisdiction to enforce the asserted claim terminated. In no decision other than the *Susquehanna* case is it intimated or suggested that because of the character of the action the provisions of said Section 16 should be given any other or different construction. Moreover, it must be apparent that if Congress had intended that such construction should be given to Section 16 only in the event the action were instituted to enforce a liability *created* by the Interstate Commerce Act, certainly it would have so provided, and not left the matter to conjecture. As no intimation to that effect appears in the statute it should, as provided in the Act, be applied by the Courts, equally to *all* actions instituted by a carrier which is subject to the Act, for the recovery of freight charges.

It would be inconceivable to assume that considering the purposes of the Act, in adopting regulatory legislation respecting carrying and demurrage charges, Congress would intentionally make such legislation applicable only to such charges as are based upon the provisions of the Act, but not to those based upon contract itself predicated on the Act. Such legislation would invite and bring about the very evils which Congress intended to root out.

It is universally known that the language in which a statute of limitations is ordinarily couched does not include the above quoted phrase. To such statute the addition of the words **"and not after"** would be un-

necessary if it were intended to apply solely to a right of action *created* by the statute itself, for the reason that in such event, without the addition of such phrase, the cause of action would not survive the period of limitation there prescribed. If, in its application to actions other than those based upon the statute, it was not intended to obliterate the cause of action, the inclusion of the phrase referred to was unnecessary. That it was purposely inserted admits of no doubt. What that purpose was is self-evident. It must be apparent that when it made such statute applicable to *all* actions brought by a "*carrier subject to the act*" and included in the statute the words "**and not after**", Congress intended—as the Courts have repeatedly held—to make clear and indisputable its meaning that, regardless of the basis of the action, at the expiration of the prescribed period the right of action should cease to exist.

That the contention just made has received judicial sanction was pointed out by this Court in the case of *Phillips v. Grand Trunk W. R. Co.*, 236 U. S. 662, 59 L. Ed. 774:

> "*Under such a statute the lapse of time not only bars the remedy but destroys the liability.*"

See also:

U. S. ex rel. Louisville Cement Co. v. Interstate Com. Com'n, 246 U. S. 638, 62 L. Ed. 914;

Kansas City S. Ry. Co. v. Wolf, 261 U. S. 133, 67 L. Ed. 571;

Galveston etc. Co. v. Webster, 27 F. (2d) 765.

In

U. S. ex rel. Louisville Cement Co. v. Interstate Com. Com'n, 246 U. S. 638, 62 L. Ed. 914,

which was a mandamus proceeding to compel the Commission to entertain and proceed to adjudicate a cause which the Commission had declared not to be within its jurisdiction, the Court, in commenting upon the construction to be given Section 16, said:

> "As to the portion of the claim which we are considering, the report of the Commission is as follows:
>
> 'The only question left for determination is whether the claim is barred, in whole or in part, by the following limitation of the Act: "All complaints for recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, **and not after.**" * * *'"

This Court, after referring to the date upon which the action accrued as determined by the Commission, and the determination of the Commission that because of such date the overcharges were barred from its consideration, said:

> "We agree with this claim of the Commission *that the two-year provision of the Act is not a mere statute of limitations, but is jurisdictional —it is a limit set to the power of the Commission, as distinguished from a rule of law for the guidance of it in reaching its conclusion.*"

See, also,

Button v. A. T. & S. F. Ry. Co., 1 F. (2d) 709.

V.

ASSUMING THAT THE BILL OF LADING, THE FORM OF WHICH IS PROVIDED BY LAW AND THE INTERSTATE COMMERCE COMMISSION, ESTABLISHES A CONTRACT BETWEEN THE PARTIES, ANY SPECIAL AGREEMENT BETWEEN THE CARRIER AND THE SHIPPER TO PROLONG THE LIMITATION PERIOD PRESCRIBED BY SECTION 16(3)(a) OF THE ACT CONSTITUTES A MODIFICATION OF THE BILL OF LADING IN VIOLATION OF LAW AND IS THEREFORE UTTERLY VOID.

Respondent contended in the Court below that the action was at common law because based on the bill of lading and that notwithstanding the express language of Section 16 (3) (a), and the reasons which brought about its enactment, it is nothing more or less than a mere statute of limitations which bars the remedy and does not affect the right of action. In this holding the Appellate Court erred.

Assuming that this action is contractual in character, keeping in mind the primary purpose sought to be accomplished by the enactment of the Interstate Commerce Act and its amendments which was to prevent discriminations and preferences, the legal principles applicable to actions admittedly based upon the Act apply with equal force to actions predicated upon a bill of lading where an attempt is made to extend the limitation period fixed in Section 16 (3) (a) of the Act.

Among other things, the Interstate Commerce Act provides that it shall be unlawful for any carrier to provide by rule, contract, regulation or otherwise a period shorter than two years for the institution of

suit against it to recover damages arising from a shipment. (49 U. S. C. A., sec. 20, par. 11.) In many instances, carriers acting under authority of this provision have issued bills of lading providing that such action for damages must be commenced within two years and a day of notice by the carrier of disallowance of the claim. In such cases the limitation of time, *although authorized by statute,* is necessarily based upon a contract entered into between the parties. Nevertheless, the Courts have had no difficulty in declaring void as against public policy any attempt on the part of the carrier or shipper to enlarge, vary or waive the limitation of time originally specified in the bill of lading. One of the leading cases of this class is

Spartan Mills v. Davis, Director General, 119 S. E. (S. C.) 905 heretofore quoted from.

There it was claimed that the limitation, as specified in the bill of lading, had been waived by the carrier. After holding that the alleged waiver was legally deficient, the Court said:

> "Even if there had been a positive agreement on the part of the defendant to extend the time within which such suit should be commenced it would not avail the plaintiff. * * * If the carrier may by agreement or by conduct fix what is 'a reasonable time for delivery' in any case it would seem that *it might or might not invoke the defense of this contractual limitation at its option, and could in that particular practice at pleasure discriminate in the payment or contest of claims.*"

It then quotes from

Texas etc. R. Co. v. Leatherwood, 250 U. S. 478, 63 L. Ed. 1096,

as follows:

> "It was decided that the parties to an interstate bill of lading cannot waive its terms; that the carrier cannot by its conduct give the shipper a right to ignore them; and that *'a different view would antagonize the plain policy of the Act and open the door to the very abuses at which the Act was aimed.'* "

The Carolina Court then declared that

> *"This declaration is equally applicable to the contract limitation relating to commencing suit."*

In the late case of

L. C. Kirkpatrick Co. v. I. C. R. Co., 195 So. 692,

it was claimed that the action was barred because not brought within two years and a day from the time appellee rejected in writing appellant's claim for damages as required by the bill of lading. In affirming a judgment in favor of the defendant the Mississippi Supreme Court, among other things, said:

> "The outstanding purpose of the Commerce Act was to absolutely uproot and destroy all discriminations in interstate commerce regardless of how conceived or by what plan, scheme or device they may be sought to be accomplished. To that end, *the carrier is without power to waive any valid provision of the contract constituting a defense.* Blair-Baker Horse Co. v. Atchison, T. & S. F. Ry. Co., 200 S. W. 109."

And after quoting from earlier cases, the decision proceeds:

> "The carrier cannot by conversations, letter and negotiations extend the time for suit beyond that limited by the bill of lading and the Commerce Act. Shroyer v. Chicago R. I. & G. Ry. Co., 111 Tex. 24, 222 S. W. 1095."

The decision then, after citing a number of state and federal cases, states:

> "The Commerce Act sought as far as possible to bring about not only uniformity and equality in rates but uniformity and equality in all services and practices of common carriers in interstate commerce. In considering this question it should be borne in mind that this is not exclusively private litigation—the result affecting alone the parties to the cause. *In a large measure it is public litigation—the result affecting the public generally as well as the parties to the particular case.* The question as to what rights can be waived by a party to a transaction affected with the public interest, is very different where the rights of the parties alone are involved."

See, also,

Chesapeake & Ohio R. Co. v. Martin, 283 U. S. 209, 75 L. Ed. 983,

where this Court had before it an action to recover damages for the misdelivery of a carload of potatoes. No notice of loss was given or claim for damages made until more than six months and twenty days after shipment from Michigan, although the bill

of lading contained a provision requiring such notice within six months after delivery of the property or, in case of failure to make delivery, after reasonable time for delivery had elapsed.

The Court reversed a judgment of the Virginia Courts in favor of plaintiff and after pointing out that the matter was one of federal law, said of plaintiff's contention that the railroad was estopped to rely upon the limitation provision:

> "To allow it would be to alter the terms of the contract made in pursuance of the Interstate Commerce Act and having, in effect, *the quality of a statute of limitations*, and thus to open the door for evasions of the spirit and purpose of the act to prevent preference and discrimination in respect of rates and service."

See also:

Shroyer v. Chicago, etc. Co., 222 S. W. 1095;
Cohen v. Texas N. O. R. Co., 25 N. E. (2d) (Ill.) 562;
N. Y., N. H. & H. R. R. Co. v. California Fruit Growers Exchange, 5 Atl. (2d) (Conn.) 353;
Wm. F. Moser Co. v. Payne, Direc. Gen., 114 S. E. (W. Va.) 365.

The foregoing authorities demonstrate that, even if the present action were looked upon as contractual in character, the attempted waiver of the limitation statute was a violation of the spirit and purpose of the Interstate Commerce Act which makes the contract one which is unchangeable by the parties.

Section 16 (3) (a) of the Interstate Commerce Act constituted part of the agreement entered into between the parties as fixed by the bill of lading. In accordance with the claim of the Act, the bill of lading, including, as it does, the provisions of the Act and the Commission's regulations, measures the rights and liabilities of the parties, and no agreement by carrier or shipper not reflected by or found in the bill of lading (including the provisions of the Act read therein) is valid or enforceable, but, on the contrary, is absolutely void. The agreement entered into between the parties herein purporting to waive the provisions of Section 16, and therefore modifying the bill of lading in which the appurtenant provisions of Section 16 are to be read, *is a special agreement varying the contract reflected by the bill of lading and must be struck down as void.*

The principle just stated is pointed out in the decisions where, by special agreement, the parties attempted to modify the bill of lading with respect to the inclusion of services not within the tariff rates specified in the bill of lading or some other comparable provision.

In

A. T. & S. F. Ry. Co. v. Robinson, 233 U. S. 173, 58 L. Ed. 901,

the plaintiff shipper sued to recover damages resulting from the late delivery of and injury to a race horse. The defendant carrier claimed that plaintiff's right was controlled and defendant's liability limited

by its published tariffs. After citing a number of decisions, the Court said:

> "We regard these cases as setting the proposition that the shipper, as well as the carrier, is bound to take notice of the filed tariff rates and that so long as they remain operative they are conclusive as to the rights of the parties. * * * To give to the oral agreements upon which the suit was brought, the prevailing effect allowed in this case by the judge of the trial court, affirmed by the judgment of the supreme court of the state, would be to allow it a *special contract* to have binding force and effect, though made in violation of the filed schedules which were to be equally observed by the shipper and carrier. If oral agreements of this kind can be sustained, then the door is open to all manner of special contracts, departing from the schedules and rates filed with the Commission. * * * To maintain the supremacy of such oral agreements *would defeat the primary purpose of the Interstate Commerce Act so often affirmed in decisions of this court which are to require equal treatment of all shippers and the charging of but one rate to all, and that one as required by the act.*"

See also

Western Union Telegraph Co. v. Esteve Bros. & Co., 256 U. S. 566, 65 L. Ed. 1094;

Penn. R. Co. v. Hamilton Coal Co., 125 Atl. (Md.) 405;

Penn. R. Co. v. International Coal Mining Co., 230 U. S. 184, 57 L. Ed. 1446;

W. H. Blodgett Co. v. N. Y. Cent. R. Co. (Mass.), 159 N. E. 45;

Chicago & Alton R. v. Kirby, 225 U. S. 155, 56 L. Ed. 1033;

Northern Wisconsin P. Co. v. Chicago & N. W. R. Co. (Wis.), 234 N. W. 726;

American Ry. Express Co. v. American Trust Co., 47 F. (2d) 16,

where it is said:

> "The tariff provision necessitating the delivery of the money to the carrier's office is *one which could not be waived by the agreement of the parties*, nor by a custom which might have constituted a waiver *had appellant not been a common carrier.*"

Chicago I. & L. Ry. Co. v. Peterson, 169 N. W. (Wis.) 558;

Chicago & N. W. Ry. Co. v. J. I. Case Plow Wks., 180 N. W. 846.

VI.

INTERSTATE COMMERCE ACT FOR FIRST TIME CREATED A RIGHT WHICH THERETOFORE WAS NON-EXISTENT IN FEDERAL JURISDICTION.

Federal jurisdiction over a subject-matter covered by federal laws constitutionally enacted occupies the same situation with respect to the several states as the laws of one state occupy with respect to the laws of another state. Such federal enactments are neither controlled nor affected by either the statute or common law of the state. Each is exclusive within its own jurisdiction.

So here, when the Transportation Act was enacted it *created a right* which previously did not exist in federal jurisdiction and with respect to which there neither was nor is any federal common law. Furthermore, as heretofore pointed out, it superseded and was a complete substitute for any state law, either statutory or common, then or previously existing in any state.

The Federal Courts have determined repeatedly and in no uncertain language what was the purpose of the enactment of the Interstate Commerce Act, which purpose extended to all of its provisions, including Section 16. The common law right of the carrier to collect transportation charges from the shipper which was strictly a contractual right, either express or implied, no longer exists. The Interstate Commerce Act changed the character and dimensions of the carrier's right to look to the shipper for his transportation charges by eliminating entirely the right of the parties to determine as between themselves the tariff rate, and by prescribing what the tariff rate should be. It substitutes the will of the Interstate Commerce Commission for the will of the parties. The tariffs prescribing the rates of the carrier, which alone it is permitted to collect or enforce, are brought into existence and published under the compulsion of the Act and must be approved by the Commission before they become effective. In the absence of the filed tariffs and their approval by the Commission, the carrier cannot enforce, by judicial process or otherwise, its claimed transportation charges.

Respondent appreciated this legal situation when, for the purpose of stating a cause of action, it alleged in its amended complaint its compliance in these respects with the Interstate Commerce Act. (R. 2, fol. 3.)

It is thus seen that the *basis* of the carrier's right of action is the tariff rate prescribed in its tariff schedules approved by the Interstate Commerce Commission, *both required by the Act,* and it is the transportation charges designated in such tariffs alone which the Act not only permits *but requires* the carrier to sue for and collect.

The right, therefore, is entirely foreign to the right recognized by the common law, and the only logical conclusion is that the Act not only *creates* the right upon which the action is based, but likewise imposes upon such right the limitation period prescribed in Section 16 of the Act.

However, no necessity exists to theorize upon this subject because it has been repeatedly determined by the Courts. In

Galveston v. Webster, 27 F. (2d) 765 (supra), the Court said:

> "The single subject-matter of the suit is the recovery by the carrier of his charges for freight in interstate transport. *Its right to sue was given by the Interstate Commerce Act. The federal law governs.*"

In

Arkansas Fertilizer Co. v. United States (I. C. C. Intervener), 193 Fed. 667,

it is said:

"* * * But the rights and obligations of both (carrier and shipper) are fixed not by mutual agreement *but by the mandate of the statute:* and the duty of a shipper to pay and of a carrier to collect the tariff rate in force when the transportation takes place, *even though that rate be grossly excessive,* is a duty imposed by legislative enactment. * * * The obligation to pay the tariff charges springs from a positive law * * *"

In

Button v. A. T. & S. F. R. Co., 1 F. (2d) 709,

it is said:

"There is no other ground upon which the case may be rested. Plaintiff's right of action is *given by statute.*"

In

Penn. R. Co. v. Carolina P. Cement Co., 16 F. (2d) 760,

the Court said:

"The cause of action is one *created by statute* which fixes the time within which action must be brought as an essential element of the right to sue."

In

Louisville & N. R. Co. v. Cory, 54 F. (2d) 8,

the proposition involved was directly determined. There, in reversing the judgment of the trial Court, the Appellate Court said:

"It is also urged by plaintiff that the statute of limitations prescribed by Section 16 (3, b) Interstate Commerce Act, 49 U. S. C. A., sec. 16 (3) (a), has no application where the declara-

tion alleges *a right of recovery at common law.* It is clear that if a cause of action is created by an Act of Congress the statute of limitations fixed by such Act must govern."

VII.

AN ACTION BY A CARRIER TO ENFORCE PAYMENT OF TRANSPORTATION CHARGES IS BASED UPON THE INTERSTATE COMMERCE ACT AND NOT UPON CONTRACT AS CONTENDED BY RESPONDENT AND AS HELD BY THE LOWER COURT.

In holding that the pending action is not predicated upon the Act, the lower Court has not only ignored the provisions of such Act, but likewise the decisions to which the attention of this Court has already been called. The Court has likewise assumed that the bill of lading covering the transportation is all controlling with respect to the obligations of both carrier and shipper, regardless of the provisions of the Interstate Commerce Act or the rules and regulations of the Commission.

The transportation charges of a common carrier and the character and extent of the service to be rendered therefor are contained in its tariff which must be filed with and approved by the Interstate Commerce Commission. Such procedure is required by the Act and the rules and regulations of the Commission. The Act compels both the carrier and the shipper to conform in every particular with such tariff. No deviation is permitted to be made by either of them respecting the rates fixed or the services to be rendered

therefor. Both carrier and shipper are charged, *as matter of law*, with knowledge of such tariff and rates, thus based upon the Transportation Act and the rules of the Commission. If any difference exists between the transportation rates and services specified in the bill of lading and those specified in the tariff, the former is subordinated to the latter. If the bill of lading fixes a transportation rate less than that fixed in the tariff, by the very terms of the Act the carrier *must* collect the difference between the amount designated in the bill of lading and the tariff rate. If the charge fixed in the bill of lading is in excess of the tariff rate the shipper is entitled to have refunded to him the difference and to enforce such right by action. These provisions of the Act, as well as the rules and regulations of the Commission, were all enacted to prevent rebates, discriminations and preferences.

Thus it will be seen that the relations between the parties are not solely contractual, nor is the bill of lading the sole measure of the rights and liabilities of either or both.

It is for these, as well as other equally cogent reasons, that the Courts have consistently held that actions of this character are based upon the Interstate Commerce Act.

One of the leading cases upon this subject, which has been frequently cited, is

Central R. Co. v. Mauser, 88 Atl. (Pa.) 791, 49 L. R. A. (N. S.) 92,

where it is said:

"In the disposition of civil cases involving violation of the provisions of the federal interstate commerce act where the effort is to collect from a shipper the legal, prescribed rate for the service rendered, equitable principles play no part. Where there has been a departure from an established and published rate for the transportation of freight, it is never a question what the purpose back of it was, whether innocent or fraudulent, or whether occasioned by mutual mistake, or by the mistake of one of the parties acted upon by the other in good faith. Both parties are alike charged with full knowledge of the prescribed rates; and if either comes short in this, it is his own fault through negligence, or, what is worse, and neither may excuse himself by showing reliance upon representations as to prescribed rates or those appearing in the printed and published schedule. No agreement for a rate other than that prescribed for the particular service could have any binding force. No matter how induced, the law will refuse to recognize in it any of the characteristics of a contract. * * *

It follows necessarily that when these defendants accepted the services of the plaintiff as carrier, the only contract under which the service was rendered was the implied one that they would pay for the service **at the rate prescribed by law**, seeing that that was the only rate by which the carrier was allowed to render the service."

And, after touching upon the conditions which led to the enactment of the Commerce Act, the decision proceeds:

"Thenceforth, the rates to be charged for transportation were removed from the field of barter and became matters of legal regulation; **the bill of lading became at once little more than a receipt** for the goods to be transported, into which could be legally incorporated nothing obnoxious to the law * * *."

And, quoting from the case of *A. J. Poor Grain Co. v. Chicago etc. Co.*, 12 Inters. Com. Rep. 418, it said:

"Under the force of the * * * (Interstate Commerce Act) the published rate has taken on a fixed and rigid character that does not permit it to yield either to importunity or to mistake * * * Regardless of the rate quoted or inserted in the bill of lading, the published rate must be paid by the shipper and actually collected by the carrier. * * * When once lawfully published, a rate, so long as it remains uncancelled, is fixed and unalterable, either by the shipper or by the carrier, as if that particular rate had been established by a special act of Congress."

In

Pennsylvania R. Co. v. Carolina Portland Cement Co., 16 F. (2d) 760,

in an action to recover demurrage charges (which are part of the transportation charges), the plaintiff therein (*respondent herein*), among other things, argued:

"(3) That the three-year period prescribed by the Act is a mere statute of limitations affecting the remedy which cannot be raised by demurrer."

In overruling this contention, the Court said:

> "We have carefully considered the arguments advanced by the learned counsel of plaintiff, but we do not think that any of the points relied on can be sustained."

And answering respondent's claim with respect to the character of Section 16, 3, of the Act, the Court stated:

> "The cause of action is one which arises out of the statutes of the United States and the action of the Interstate Commerce Commission taken thereunder. (Citing cases.)
>
> The cause of action is one *fixed by the statute* which fixes the time within which such action must be brought as an essential element of the right to sue, and in such cases it is well settled that a declaration or complaint which shows on its face that the action was not brought within the time prescribed is demurrable. (Citing cases.)"

We have already quoted from the Commerce Court decision in *Arkansas Fertilizer Co. v. United States*, 193 Fed. 667, language which included the statement that

> *"the relations between shipper and carrier are no longer contract relations; that the rights and obligations of both are fixed not by mutual agreement but by mandate of the statute."*

In *Galveston, H. & S. A. R. Co. v. Webster*, 27 F. (2d) 765 (supra), which was an action to recover

freight charges due from the shipper based upon a surety bond, in which the question arose whether the state rules and statutes affecting the liabilities of principal and surety were applicable, the Court said in part:

> "The Congress has undertaken in this Transportation Act to definitely fix the time within which carriers in interstate commerce may bring suits for the recovery of freight charges. The suit is one in which the carrier sues to recover charges due it for the transportation of defendant Webster's property in interstate commerce. * * *
>
> "The single subject matter of the suit is the recovery by the carrier of his charges for freight in interstate transport. *Its right to sue is given by the interstate commerce act. * * * the federal law governs.*"

And in the case of *Button v. A. T. & S. F. R. Co.*, 1 F. (2d) 709, which was likewise a case in which the carrier sought to recover a balance due it for freight charges, and in which the provisions of Section 16 (3)(a) were interposed as a defense, the Circuit Court of Appeals, in reversing a judgment for plaintiff, said:

> "There is another ground upon which the case may be rested. Plaintiff's right of action is given by statute. It was not created for its enrichment, but to protect the public against secret rebates and discriminations. It is not a right of contract or of property * * * As to such a right (statutory) the time limit for its enforcement is a constituent

part of the right itself. The lapse of time not only bars the remedy but destroys the liability."

In *Chicago I. & L. Ry. Co. v. Peterson* (Wis.), 169 N. W. 558, the Court said, in an action to recover freight charges on an interstate shipment:

> "The relations between common carriers and shippers are no longer mere matters of contract, but are fixed by the laws and rules regulating such interstate commerce and partake of the nature of statutory obligations." (Citing cases.)

And in another such case,

> *Chicago & N. W. Ry. Co. v. J. L. Case Plow Works,* 180 N. W. 846,

the same Court said:

> *"The right to private contract between shipper and carrier is wholly abrogated by the Interstate Commerce Act, and the rates fixed by law are enforceable by the carrier by force of law."*

That an action by a carrier to recover transportation charges the amount of which depends upon the carrier's tariff, which tariff was prepared, filed, approved and published pursuant to the mandate of the Interstate Commerce Act and the rules and regulations of the Commission, and the collection of which charges was a positive duty imposed upon the carrier by the Act, is an action based upon the Act has been definitely held in the following cases:

> *Vicksburg etc. R. Co. v. Paup,* 47 F. (2d) 1069;
> *Peninsula Products Ex. v. New York P. & N. R. Co.,* 137 Atl. 350;

Chicago N. W. Ry. Co. v. J. L. Case etc. Wks., 180 N. W. 846;

American Ry. Express Co. v. American Trust Co., 47 Fed. (2d) 16;

Zang v. Railway Express, 196 N. E. (Ohio) 901;

Allen v. New York etc. Ry. Co., 15 F. (2d) 532.

VIII.

THE DISSENTING OPINION RENDERED IN THE PRESENT CASE, BEFORE THE CALIFORNIA DISTRICT COURT OF APPEAL, IS CONSISTENT WITH THE LAW AS LAID DOWN BY THE DECISIONS OF THIS COURT.

In respondent's brief the majority opinion written by Marks, Judge, Associate Justice, District Court of Appeal, California, Fourth Appellate District (R., 171, at 177) is quoted as supporting respondent's position. In this connection we might appropriately call the Court's attention to the fact that in affirming the judgment of the trial Court the Court of Appeals was not unanimous, two opinions having been written. The majority opinion is not only at variance with the dissenting opinion but antagonistic to the decisions of this Court, as well as all federal Appellate Courts and, with the exception of the *Susquehanna* case, the decisions of all Federal Courts.

The dissenting opinion, to which we invite the Court's attention (R., 179-191, 124 Pac. (2d) 907-913) is not only in harmony with controlling decisions, both federal and state, but in our opinion its

reading must convince this Court that it apparently was written as the opinion of the Court. Strange as it may appear, the worth of this dissenting opinion is attested in the majority opinion by the following language found in the majority opinion:

> "The facts of this case are clearly and fairly stated in the opinion prepared by Mr. Justice Pro Tem. Schottky and need not be repeated here. He also cites the leading cases on the question presented, though we believe a somewhat closer examination of some of them is advisable." (R., 171.)

The reproduction here of this dissenting opinion would unduly enlarge this brief, but we commend it to the consideration of this Court for the reason that it is in accord with the decision of this and other federal tribunals, and clearly and succintly points out the legal propositions as well as the decisions supporting them by which the determination of this controversy should be controlled.

DISCUSSION OF RESPONDENT'S CITATIONS.

ANALYSIS OF DECISION OF PENNSYLVANIA R. CO. v. SUSQUEHANNA C. CO. DESTROYS ITS USEFULNESS AS A CONTROLLING AUTHORITY.

The respondent herein, as well as the lower Court, relies principally upon the decision rendered by an Ohio District Court in *Pennsylvania R. Co. v. Susquehanna C. Co.*, 23 Fed. (2d) 499, in passing upon a demurrer to plaintiff's complaint, which decision, as heretofore indicated by petitioner, contains no citation

of authority and, although decided in 1927, over seventeen years ago, has never been cited in any textbook or subsequent decision.

In the lower Court it was asserted by respondent that

> "since it had presented the exact question to the federal court and received a decision sustaining the exact type of agreement here involved it was perfectly natural for respondent to follow the principles determined."

It would seem to us, however, that if respondent herein was justified in relying upon any Court determination for the protection of its alleged rights, in lieu of acting upon the ruling of a trial judge in passing upon a demurrer, it would have preferred to rely upon the decision of the Federal Court of Appeals rendered in the case of

> *Pennsylvania R. Co. v. Carolina Portland Cement Co.*, 16 Fed. (2d) 760,

in which case the plaintiff (respondent herein) contended that

> "the three-year limitation period provided for by said Section 16, 3, of the Act did not apply to demurrage charges, and also that it was a mere statute of limitations affecting the remedy which could not be raised by demurrer",

with respect to which the Circuit Court of Appeals (4th District) in reversing the judgment in favor of plaintiff, after holding that causes of action to recover demurrage or storage charges (transportation charges) were within the terms of the statute said:

> *"The cause of action is one created by statute which fixes the time within which action must be brought as an essential element of the right to sue,* and in such cases it is well settled that a declaration or complaint which shows on its face that the action was not brought within the time prescribed is demurrable." (Citing *Phillips v. Grand Trunk R. Co.,* 236 U. S. 662, 59 L. Ed. 774.)

In our brief accompanying the petition filed herein we commented upon certain of the anomalous features of the Susquehanna decision which need not here be repeated, but which, if no other reason existed, would at least impair its value as an authority. However, inasmuch as so much reliance is placed upon it by respondent and by the lower Court, we will briefly analyze the principles therein enunciated upon which the Court's order overruling the demurrer was predicated and test their accuracy by decisions of Appellate Courts, and thus demonstrate that the decisions in the *Susquehanna* case not only lacked support in, but is so opposed to the determination of federal appellate tribunals that as an authority on the legal proposition here involved, it is utterly destroyed.

Claim of defendant in Susquehanna case confined to but one point. Other points here made neither raised nor considered by Court.

A reading of the decision in the *Susquehanna* case will disclose that the SOLE contention of the defendant therein was that

> "the right to recover demurrage charges was one conferred by statute",

and that therefore the suit to recover such charges had to be brought within the statutory period which could not be prolonged by waiver of the statute. It was not contended in that case, as claimed here, that

1. Regardless of whether the right was conferred by statute or by contract, nevertheless Section 16 of the Act destroyed the right of action as well as barred the remedy.

2. That said Section 16 applied to *every* cause of action therein referred to, regardless of how it originated or whether a common law action, provided it was an action *at law* being asserted against or by a common carrier *subject to the Interstate Commerce Act.*

3. That the statute with respect to the controversies to which it applies, *by its very terms,* as construed by the Court, destroyed the liability or the cause of action upon the expiration of the period therein prescribed, or

4. That the words *"and not after"* were inserted in Section 16 by Congress for the definite purpose of destroying the liability therein referred to, unless an action was instituted to enforce it within the time prescribed, and prohibited the extension of such period to prevent preferences and discriminations.

None of these considerations, which in whole or in part constituted the basis for the decisions relied on by petitioner herein, was given consideration or determinated by the Court. It can thus be readily understood that for these, if for no other reasons, the

Susquehanna case is of no importance as an authority. But other and equally as cogent reasons exist why this "relied on" decision should be discarded as a controlling precedent.

Legal principles enunciated in Susquehanna decision are not only unsupported by but are antagonistic to declarations of Appellate and other Courts.

In analyzing this decision we intend first to state each legal provision announced by the Court and then direct this Court's attention to the decisions clearly antagonistic to the propositions thus declared.

Proposition 1. The Court said:

> "* * * plaintiff's right to recover demurrage charges is not a right conferred by the Interstate Commerce Commission and is not within the authorities relied on by defendant. * * * plaintiff's right of action arises out of contract."

That this statement is in opposition to the law as established by this Court and other Appellate Courts is readily observable from an examination of the following authorities most of which have been heretofore cited by us herein:

Pennsylvania R. Co. v. Carolina Portland Cement Co., 16 Fed. (2d) 760, supra;

Arkansas Fertilizer Co. v. United States, 193 Fed. 667 (decision by five judges of Commerce Court);

Galveston etc. v. Webster, 27 Fed. (2d) 765;

Button v. A. T. & S. F. Ry. Co., 1 Fed. (2d) 709;

Kansas City S. R. Co. v. Wolf et al., 261 U. S. 133, 67 L. Ed. 671;

Vicksburg etc. R. Co. v. Paup, 47 Fed. (2d) 1069;

A. J. Phillips Co. v. Grank Trunk R. Co., 237 U. S. 662, 59 L. Ed. 774;

Peninsula Prod. Exchange v. N. W. P. & N. R., 137 Atl. 360;

Chicago I. & L. Ry. v. Peterson, 169 N. W. 558;

Chicago N. W. R. Co. v. J. I. Case etc. Wks., 180 N. W. 846;

W. H. Blodget Co. v. New York C. R. Co., 159 N. E. (Mass.) 45.

Proposition 2. Plaintiff's right of action arises out of contract, even though demurrage charges, like tariff rates, must be prescribed in a tariff filed with the Interstate Commerce Commission and cannot be departed from or varied by the parties either before or after the service is performed.

It will be observed that although the Court recognized that the "demurrage charges, like tariff rates", had to be prescribed by a tariff filed with the Interstate Commerce Commission, yet it held that a cause of action based thereon was nevertheless a right of action growing out of contract. This conclusion is likewise directly in the face of the decisions.

The bill of lading which the Court undoubtedly characterized as a contract between the parties is what is known as a "uniform bill of lading" prescribed by the Interstate Commerce Commission under authority

conferred upon it by the Act. The bill of lading (Section 7) provides:

> "The owner of assignee shall pay the freight and average, if any, and all other lawful charges accruing on said property * * *. The consignor shall be liable for the freight and all other lawful charges except * * *."

It will therefore be seen that the so-called contract is based upon the act and its form and substance are prescribed by the order of the Commission. It therefore occupies the same status as does the tariff upon which the freight charges are based.

That such is the law is pointed out in:

Arkansas Fertilizer Co. v. United States, 193 Fed. 667 (supra);

Galveston etc. v. Webster, 23 F. (2d) 765 (supra).

Proposition 3 (language of the Court):

> "The cases cited under other provisions of the same section (16 (3)) have no application. In these cases the right of action did not grow out of contract, but out of the statute. No right of action existed except until and as the Interstate Commerce Commission made a finding of certain facts."

The Court evidently was of the opinion that it was only in those actions where the amount sought to be recovered *was based upon a finding of the Interstate Commerce Commission*, that the action was barred within the time prescribed regardless of whether the parties had executed an agreement waiv-

ing such statute. That such is not and cannot be the law must be apparent.

Where it is claimed that freight charges are excessive and unreasonable, the action of the Commission can be invoked. The finding of the Commission merely determined the freight rate which should have been specified in the tariff of the carrier and substitutes such rate for the rate contained in the tariff. The action to recover the freight charges, if brought by the carrier, or the overcharge, if brought by the shipper, is necessarily based upon the services rendered in transporting the shipper's commodities as reflected by the substituted tariff rate.

This Court will recall that in construing subdivision (c) of Section 16 of the act, in *Phillips v. Grand Trunk R. Co.*, 236 U. S. 662, held that it applies to *an action at law* as well as to a proceeding before the Commission. This is also pointed out in *Kansas City So. Ry. Co. v. Wolf*, 261 U. S. 133, supra.

See also

Wisconsin Bridge & Iron Co. v. Illinois Terminal Co., 88 Fed. (2d) 459.

But there is still a later portion of the decision thus relied on by respondent and the lower Court which, although not pertinent here, discloses a schism not alone between such Court and other and higher Courts, but between it and respondent herein, which should properly be given consideration by this Court in reaching a conclusion respecting the importance to be given to the decision in the *Susquehanna* case. In concluding its decision the Court said:

Proposition 4 (language of the Court):

> "In view of this conclusion it is unnecessary to consider whether a right *created by statute with the condition annexed that it shall be enforced within a limited period, as suits for wrongful death or actions on a reparation award of the Interstate Commerce Commission,* may be kept alive by a voluntary agreement of the parties. *It is difficult, however, to conceive any sound reason why it may not.* Certainly none of the cases cited so hold."

It has always been conceded by respondent, and it was determined by the Court below, that where a right of action was created by statute and it is therein provided that an action to enforce such right must be commenced within a time specified, upon the expiration of such period the obligation as well as the remedy is destroyed. In its decision upon this subject the California Supreme Court in present case, *Pennsylvania R. Co. v. Midstate etc. Co.*, 21 Cal. (2d) 243 at 249, stated:

> "The general rule governs unless the action is created by statute and the language of definition requires a construction that the cause of action is destroyed by the lapse of the period of limitation provided by the statute. Under that exception to the rule the expiration of the time within which such suit must be brought operates to terminate the obligation as well as to bar the remedy."

CASES RELIED ON BY RESPONDENT IN ITS ANSWER TO PETITIONER'S BRIEF FILED WITH THE PETITION ARE NEITHER CONTROLLING NOR APPLICABLE.

On page 6 of respondent's brief filed in opposition to petition for writ of certiorari three cases are cited.

Louisville & N. R. Co. v. Central Iron & Coal Co., 265 U. S. 59, 68 L. Ed. 900, arose prior to the amendment of the Interstate Commerce Act which made the consignor liable for all freight charges if not otherwise paid. Furthermore, its decision was prior to the inclusion within the Act of its existing limitation provisions. In our opinion, the citation of this authority is unfortunate for respondent for the reason that in the opinion of Mr. Justice Brandeis the following is stated:

> "The shipment, being an interstate one, the freight rate was that stated in the tariff filed with the Interstate Commerce Commission. The amount of the freight charges legally payable was determined by applying this tariff rate to the actual weight. THUS THEY WERE FIXED BY LAW. No contract to the carrier could reduce the amount legally payable or release from liability a shipper who had assumed an obligation to pay the charges."

It was further held, however, that under the law, as it then existed, the parties could contract as between themselves with respect to the liability of the transportation charges, the Court saying:

> "But delivery of the goods to a carrier for shipment does not, under the Interstate Commerce Act, impose upon a shipper an absolute obligation

> to pay the freight charges. The tariff did not provide when or by whom the payment should be made. As to these matters carrier and shipper were free to contract subject to the rule which prohibits discrimination."

The transaction upon which the action was predicated occurred in January, 1917, and it was under the law as it then existed that the decision was rendered. On February 28, 1920, subdivision 2 of section 3 of the Act (Title 49, U. S. C. A. 3(2)) was amended so as to read:

> "No carrier by railroad, subject to the provisions of this chapter, shall deliver or relinquish possession at destination of any freight transported by it until all tariff rates and charges thereon have been paid, except under such rules and regulations as the Commission may from time to time prescribe to assure prompt payment of all such rates and charges and to prevent unjust discrimination."

It is not, and cannot be claimed, that any rule or regulation of the Commission converted any uniform bill of lading into a private contract between the parties which could be changed *ad lib.*

Furthermore, Ex-Parte Order No. 73 issued by the Interstate Commerce Commission, of which this Court will take judicial notice, contains the following provisions:

> "It is Ordered: That the following rules and regulations be, and they are hereby, prescribed to become effective on July 1, 1920, and remain in force until the further order of the Commission:

1. Where retention of possession of any freight by the carrier until the tariff rates and charges thereon have been paid will retard prompt delivery or will retard release of equipment or station facilities, the carrier, upon taking precautions deemed by it to be sufficient to insure payment of the tariff charges *within the period of credit herein specified,* may relinquish possession of the freight in advance of payment of the tariff charges thereon, and may extend credit in the amount of such charges to those who undertook to pay such charges, such persons being called herein shippers, for a period of ninety-six hours, to be computed as follows: * * *

5. The mailing by the *shipper* of *valid* checks, drafts or money orders which are satisfactory to the carrier in payment of the tariff charges, within the period of credit prescribed above, may be deemed to be payment of the tariff charges within the period of ninety-six hours of credit."

Not only did respondent violate the Act, as well as the bill of lading and the Commission's regulations, but without notice to petitioner it continued making deliveries of the grapes being transported on the same basis until all of the shipments had been received by the Jerome Company.

Additionally, a construction of Section 16, (3)(a) was not involved.

The two remaining cases are equally inapplicable. The decision in *New York C. R. Co. v. Mutual Orange Distributors,* 265 U. S. 59, antedates the adoption of Section 16, (3)(a) of the Act by two years, and it is

therefore obviously not here applicable. In the absence of any federal enactment upon the subject the state statute of limitations applies. The point involved in the action just referred to was which section of the California statute of limitations applied.

In *Atchison T. & S. F. R. Co. v. Hunt Bros. Packing Co.*, 34 Fed. (2d) 582, a decision by a Missouri District Court, although decided after the adoption of the pertinent act, goes no farther than to hold that a consignor is primarily liable for freight charges unless the bill of lading says otherwise.

ALLEGED WAIVER OF LIMITATION STATUTE VOID BECAUSE PROHIBITED BY INTERSTATE COMMERCE ACT AS A DISCRIMINATION.

That the attempted waiver here under consideration was ineffectual and void because it violated the spirit as well as the letter of the Interstate Commerce Act, particularly Section 16 (3)(a), is made manifest in petitioner's brief accompanying its petition, and requires no elaboration. (Br. Supp. Pet., pp. 31-34.) Whether a specific violation of the Act actually results in a discrimination is unimportant. The condemnation is directed to all acts which may or could result in such discrimination. That a waiver of the character here involved could readily permit discriminations resulting in immeasurable advantage to certain shippers as against others as well as to certain carriers as against others, as indicated upon the pages of petitioner's brief above referred to, is indisputable. As

was well said in the dissenting opinion in the California District Court of Appeal in the present case, written by Judge Schottky:

"We are convinced from the authorities that the conclusion reached by the court in the Susquehanna case is opposed to the great weight of authority. We believe that it was the intention of Congress in fixing the limitation of 'within three years and not after' to guard against the circumvention of one of the chief purposes sought to be achieved by the enactment of the Interstate Commerce Act, namely, the prevention of preferences and discriminations among persons, firms, corporations and localities. We believe further that under the decisions of the United States Supreme Court and various United States circuit courts and district courts, we are compelled to hold that when Congress provided in the Interstate Commerce Act that 'all actions at law by carriers subject to this chapter for recovery of their charges, * * * shall be begun within (fol. 293) three years from the time the cause of action accrues and not after', it meant that carriers should not grant preferences for delaying for a long period of time the enforcement of the payment of charges, and therefore intended to provide, and did provide, that unless the action was commenced within the three-year period, the carrier would lose the right to collect them by action. In construing this section we must have in mind the paramount purpose of the Interstate Commerce Act, and when we have that purpose in mind, that it was an act to protect the public against rebates and discriminations, it is not difficult to understand why the federal courts have,

with the single exception of the Susquehanna case, held that the period provided for the commencement of actions thereunder was different from the ordinary statute of limitations created for the benefit of the debtor, who could waive it, because it was simply a matter which concerned the parties to the action.

"It may be that in some cases the waiver of the statute will not result in undue or unreasonable preference or discrimination. However, that is a question that goes to the wisdom or policy of the act, and, as was said by Mr. Justice Field, later a justice of the Supreme Court of the United States (fol. 294) in Ex parte Newman, 9 Cal. 502, 520,

> 'It is not for the judiciary to pass upon the wisdom and policy of legislation; and when it does so, it usurps a power never conferred by the Constitution.'

"We conclude, therefore, that under the provisions of section 16, 3(a), upon the expiration of the period therein prescribed within which action must be taken by the carrier, the cause of action is destroyed and the court's jurisdiction over the matter is terminated; and that neither the carrier nor the shipper can legally waive the provisions of said section, nor extend the period within which an action must be instituted, and that any such waiver or agreement to forebear is contrary to the plain policy of the act and is therefore against public policy and void."

CONCLUSION.

It is respectfully but with confidence submitted that for the reasons herein, and in the brief filed in support of petitioner's application for certiorari, set out, that the opinion rendered by the Supreme Court of the State of California is contrary to the decisions of this and other federal tribunals; that it is legally unsupportable, and that the judgment entered in this case by the lower Court should be reversed.

Dated, San Francisco,
October 4, 1943.

HIRAM W. JOHNSON,
THEODORE H. ROCHE,
JAMES FARRAHER,
Attorneys for Petitioner.

THEO. J. ROCHE,
GEORGE A. STOCKFLETH,
Of Counsel.